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Nos. 89-1714, 90-113 and 90-1[illegible]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HARRIET PAULEY, Survivor of JOHN C. PAULEY,
Petitioner,

v.

BETHENERGY MINES INC., *et al.*,
Respondents.

CLINCHFIELD COAL COMPANY,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, *et al.*,
Respondents,

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On Writs Of Certiorari To The United States Courts Of Appeals For The Third And Fourth Circuits

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JOINT REPLY BRIEF FOR THE PETITIONERS CLINCHFIELD COAL COMPANY AND CONSOLIDATION COAL COMPANY

ALLEN R. PRUNTY**
JACKSON & KELLY
1600 Laidley Tower
P.O. Box 553
Charleston, WV 25322

Of Counsel:

JOHN J. BAGNATO
SPENCE, CUSTER, SAYLOR, WOLFE & ROSE
U.S. National Bank Building
P.O. Box 280
Johnstown, PA 15907

MARK E. SOLOMONS*
LAURA METCOFF KLAUS
ARTER & HADDEN
Suite 400
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 775-7154

**Counsel of Record for the Clinchfield Coal Company*

***Counsel of Record for the Consolidation Coal Company*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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JOINT REPLY BRIEF FOR THE PETITIONERS CLINCHFIELD COAL COMPANY AND CONSOLIDATION COAL COMPANY

INTRODUCTION

In these consolidated cases, the mine operator parties and the Government seek this Court's affirmation of the validity of the Department of Labor's ("DOL") black lung interim rebuttal regulations at 20 C.F.R. § 727.203(b). The provisions at issue permit a mine operator to demonstrate that it is not liable to pay black lung benefits, if the evidence proves that the miner did not contract black lung disease or, that the miner's total disability or death was not related to this disease. *Id.* § 727.203(b)(3), (4).

The black lung claimant parties in these cases assert that these avenues of inquiry were blocked under the Social Security Administration's ("SSA") interim rules. 20 C.F.R. § 410.490 ("section 410.490"). Accordingly, DOL's rules are more restrictive than SSA's and thus invalid under section 402(f)(2) of the Black Lung Benefits Act, 30 U.S.C. § 902(f)(2) ("section 402(f)(2)"). The claimants argue that the invocation of SSA's interim presumption by x-ray, biopsy, autopsy or pulmonary function test ("PFT") evidence[1] irrebuttably presumes that the miner has or had black lung disease and that the disability or death of the miner is causally related to this occupational disease. Section 402(f)(2) of the Act then requires DOL to apply the same irrebuttable presumptions in the claims it adjudicates. Responding to the assertion that DOL's contrary

[1] In No. 90-113, the DOL presumption was invoked on the basis of arterial blood gas tests, a method not available under SSA's rule. The claimant involved in 90-113, John Taylor, adopts the substantive arguments of Mrs. Pauley (No. 89-1714) and Mr. Dayton (No. 90-114) that section 410.490 erects an irrebuttable presumption. Taylor then argues that this irrebuttable presumption applies in his case, even though the SSA rule makes no provision for entitlement based on the results of blood gas tests. Taylor theorizes (incorrectly) that blood gas tests measure the same physical manifestations as PFTs and therefore section 402(f)(2)'s mandate applies to blood gases as well. Brief for Respondent John Taylor at 10, 12. This argument plainly does not work. DOL's criteria for evaluating blood gas evidence are manifestly more favorable to claimants. The restrictivity prohibition of section 402(f)(2) cannot be offended. The points raised by Taylor neither merit nor are accorded any further attention in this Reply Brief.

interpretations are entitled to judicial deference, Pauley and Dayton argue that only SSA's interpretation as reflected in its claims manual is entitled to deference, and, because of the liberal purpose of the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 ("Act"), claimants' interpretations are also entitled to special respect.

Pauley and Dayton then concede that, in light of 30 U.S.C. § 932(c), individual mine operators cannot be held liable for claims in which it is proven that a miner's disability or death did not arise in part from pneumoconiosis caused by the miner's employment with the operator. Thus, a claimant who is eligible in a case involving a mine owner who cannot be held liable, receives benefits from the Black Lung Disability Trust Fund. This theory makes it unnecessary for the Court to address the due process arguments presented as it insulates employers from liability, where no harm was done to the miner by the employer.

A brief amicus curiae has been filed by the United Mine Workers' of America ("UMWA") in support of the claimants. The National Council on Compensation Insurance ("NCCI"), a workers' compensation insurance industry affiliated organization, and the National Coal Association ("NCA"), a trade association of mine owners and related businesses, have filed amici curiae briefs in support of the mine operators. NCCI points out that the liability advocated by the claimants in these cases is not insured and could not be insured under black lung compensation insurance policies. NCA argues that Congress did not intend to deprive mine operators of any meaningful opportunity to defend black lung claims and urges the Court not to "dump" liability for non-meritorious claims on the Black Lung Disability Trust Fund.

The mine operator parties join the Government in arguing that the irrebuttability theory is neither valid nor even believable. Both the operators and the Government point out that SSA's presumption, while it is complex and perhaps redundant, encompasses the possibility of factual inquiry into the elements of entitlement addressed in DOL's

third and fourth rebuttal methods. This view is supported by the plain language of the SSA rule and the Act.

ARGUMENT IN REPLY

I. THE IRREBUTTABILITY THEORY IS NOT BELIEVABLE

Wholly apart from the tangle of SSA's regulations, the arguments made by the claimants suffer from a lack of believability. The irrebuttability theory cannot be accepted unless one concludes that in 1972, SSA issued eligibility regulations ensuring awards of black lung benefits in a huge number of black lung claims, whether or not a miner was totally disabled by or died due to pneumoconiosis, or even had the disease. The 1972 statute did not in any way authorize such a departure from its plain language.[2] To accept the irrebuttability theory, it is first necessary to conclude that SSA violated the Act.

The next improbable conclusion that must be reached to justify invalidation of DOL's rebuttal rules is that in 1978, Congress expressly validated SSA's violation of the law and that DOL knowingly and willfully disobeyed Congress, or did so in such an obvious way by inadvertence. It is also necessary to believe that DOL's enormous act of disobedience was not noticed by Congress or anyone else until ten years later when this Court decided *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988).

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[2] The 1972 amendments to the Act generated SSA's adoption of section 410.490. Section 411(c)(4) of the Act, 30 U.S.C. § 921(c)(4), contains Congress's only statutory amendment enacted in 1972, stating the extent to which proof uncertainties were to be resolved in favor of claimants. This provision erects a rebuttable presumption of eligibility if the miner has fifteen years of mining employment and suffers from a totally disabling respiratory or pulmonary disease. The statute provides: "The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." In section 410.490(a), SSA stated that it was merely implementing the language and intent of the 1972 amendments. SSA clearly had no authority to take it upon itself to make unwarranted awards, notwithstanding the statute.

Finally, it must be assumed that Congress mandated a largely irrebuttable interim presumption and then failed to fund the billions of benefit dollars it would generate. In *Pittston Coal Group*, the insurance industry, relying on DOL data, reported that the Fourth Circuit's decision in *Broyles v. Director, Office of Workers' Compensation Programs*, 824 F.2d 327 (4th Cir. 1987), *aff'd in part, Pittston Coal Group*, 488 U.S. at 119,[3] had it been applied from 1978 forward, would increase unfunded benefit costs by from "$3 billion to $6 billion or more." Brief Amicus Curiae of the National Council on Compensation Insurance, *et al.* at 9, *Pittston Coal Group* (Nos. 87-821, 87-827, 87-1095). The Black Lung Disability Trust Fund is $3 billion in debt under the DOL presumption,[4] and if corrective action had not been taken by Congress in 1981, would have faced a $9 billion deficit by 1995.[5] Accordingly, if Congress truly expected the level of irrebuttability suggested here, its miscalculation of the cost of the program was monumental.

There is no proof in the vast legislative history of the program or elsewhere that SSA was authorized to ignore the plain language of the Act in 1972, that DOL deliberately broke the law in 1978, or that Congress would have sanctioned a huge unfunded liability that would, of necessity, fall back on the U.S. taxpayers. While Congress may not always fully appreciate the effects of its actions, the chain of events that must be assumed to accept the irrebuttability theory is not likely to have occurred.

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[3] The Fourth Circuit's analysis in *Broyles* formed the basis for its decisions in Nos. 90-113 and 90-114.

[4] U.S. Dep't of the Treasury, *Black Lung Disability Trust Fund, Status of Funds* (Sept. 1990). The aggregate debt would be still higher had Congress not excused all interest payments on the Trust Fund's debt from 1985 to 1990. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a), (b), 100 Stat. 312 (1986).

[5] *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund, Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 271 (1981) (statement of Labor Secretary Raymond J. Donovan).

II. DOL'S INTERPRETATION OF 30 U.S.C. § 902(f)(2) IS CORRECT

A. DOL Was in the Best Position to Know What Congress Expected

Less than two months after enactment of 30 U.S.C. § 902(f)(2), DOL published proposed regulations,[6] including an interim presumption that is virtually identical to the version in section 727.203 finally adopted several months later.[7] It is, therefore, clear that from the beginning DOL interpreted section 402(f)(2) of the Act and SSA's section 410.490 to allow rebuttal in any case in which the miner did not have pneumoconiosis or suffer total disability or death due to this disease. DOL's contemporaneous interpretation was surely informed by some authority. In congressional testimony, DOL had already expressed uncertainty over the exact meaning of the interim presumption. *Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 146-47 (1977) (statement of Labor Assistant Secretary Elisburg). It is reasonable to assume, however, that the uncertainty was dispelled first through DOL's participation in the legislative process and then when SSA and DOL sat down together, pursuant to congressional instructions to fully coordinate their responsibilities under the 1978 amendments.[8] It also follows that DOL's interpretation of section 402(f)(2) of the Act and section 410.490 reflected in the DOL presumption is consistent with SSA's.[9]

[6] 43 Fed. Reg. 17,770 (1978).

[7] In the document adopting the final rule, DOL listed the public comments received by the agency. No commentator seems to have expressed a belief that DOL's substantive rebuttal provisions violated section 402(f)(2). 43 Fed. Reg. 36,826 (1978).

[8] Under 30 U.S.C. § 945, DOL and SSA were required to review all previously denied and pending claims. The claims were to be passed between the agencies and all of them were to be finally reviewed by DOL under its version of an interim presumption. 30 U.S.C. § 902(f)(2)(A), (B). Congress instructed the two agencies "to establish a satisfactory mechanism to coordinate their responsibilities." H.R. Rep. No. 864, 95th Cong., 2d Sess. 20-22 (1978). If DOL and SSA utilized substantially different eligibility rules, effective coordination would have been almost impossible.

Although lengthy efforts are made by Pauley and Dayton to dissect section 410.490, its cross-references, and the SSA manual to show that section 410.490 and section 727.203(b) are irreconcilably in conflict, the resolution proposed is no more than a result-oriented product that serves Pauley's and Dayton's objectives. They are in no better position than any other outside observer to offer an authoritative interpretation of the meaning of hastily drafted nineteen year old SSA regulations, implementing ambiguous language in a Senate Report, that generally went out of service eighteen years ago, when SSA's program terminated on June 30, 1973.

Section 410.490 is not a manifestly clear rule. It is, at points, redundant and inexplicable. Pauley and Dayton attempt to turn its literary shortcomings to their advantage and reach conclusions with a high degree of certainty, but ultimately leave out too much text to support a coherent theory.

B. X-ray Evidence of Pneumoconiosis Does Not Irrebuttably Presume Disease Causation

Pauley claims that a miner who invokes section 410.490 by x-ray evidence acquires an irrebuttable presumption of

[9] Both Pauley and Dayton urge the Court to defer to SSA's interpretation of section 410.490, but offer only their own views on the meaning of the words in section 410.490 and SSA's manual. There is no direct evidence to speak for SSA. There is no direct proof that SSA and DOL ever disagreed. Moreover, since the Solicitor General is the statutory representative of all executive agencies in this Court, 28 U.S.C. § 518(a), it may be expected that an interpretation of regulatory or statutory language urged by the Solicitor General here, reflects the final considered legal opinion of the executive branch, even if in retrospect.

"disability causation"[10] because no other segment of section 410.490 directly requires a factual inquiry into this element of the case. The mine operators point out that section 410.490(c) addresses this element by cross-referencing other SSA rules (20 C.F.R. §§ 410.412(a)(1), 410.426(a)) that include criteria for determining whether a presumed total disability or death is related to pneumoconiosis ("disability causation"). *See* 20 C.F.R. § 410.426(a). Pauley responds by arguing that the Court should narrow the plain language of the incorporated provisions.[11] This Court's decision in *Pittston Coal Group* rejects an analytic approach that artificially limits the plain meaning apparent in SSA's cross-references. There, this Court would not accept DOL's argument that the word "criteria" in section 402(f)(2) of the Act means only "medical" criteria, but not "other conditions for recovery" appearing among SSA's criteria. *Pittston Coal Group*, 488

[10] Citing dictum in *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135, 151 (1987), Pauley points out that x-ray proof of pneumoconiosis in the invocation inquiry precludes rebuttal under DOL's "pneumoconiosis" rebuttal section 727.203(b)(4). This is almost always true but not always a proper conclusion. A person may contract pneumoconiosis that is detectible by x-ray from non-coal mine exposures.

[11] Pauley argues that the reference in section 410.490(c) to "section 410.412(a)(1)," rather than all of section 410.412 is inherently meaningful. That is not so. Section 410.412(a)(1) "defines" "total disability" to encompass several components, including an inability to perform comparable and gainful work and disability causation. ("A miner shall be considered totally disabled due to pneumoconiosis if: *his pneumoconiosis prevents* him from engaging in [comparable and gainful work]." (Emphasis supplied.)) The disability causation element is clearly present in section 410.412(a)(1) without reference to any other segment of section 410.412. The cross-reference to sections 410.424-410.426 which in turn provide more detailed criteria for evaluating the listed components of "total disability" appears then at the end of section 410.412(a)(1). It is reasonably clear throughout all of SSA's rules, including section 410.490(c), that the meaning of the term "total disability" is defined in section 410.412(a)(1). This definition invariably focuses on the cause of the disability as well as its extent. This is, in fact, one of the few consistent patterns in SSA's rules. Pauley's attempt to limit the overall definition to exclude reference to causation is unjustified and strained.

U.S. at 116. Here, Pauley asks the Court to excise the disability causation element from SSA's cross-reference. There is no better reason to give "unnaturally limited meaning" to SSA's criteria in this regard than there was in *Pittston Coal Group*. *See id.*

Two explanations are offered to buttress Pauley's theory: (1) that SSA's claims manual does not include the cross-references to section 410.412(a)(1), and (2) that Pauley's reading is consistent with SSA's concern that it was "virtually impossible" for a miner to prove disability causation. Neither argument forms a basis for departure from the text of the rules.

As to the SSA manual, this previously undiscovered document "has no legal force." *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981). As an indication of SSA's interpretation of section 410.490, it is not very helpful to Pauley and Dayton. Paragraph IB6(d) of the manual merely states that total disability or death due to pneumoconiosis is presumed if the criteria in paragraph IB6(c) are met "and there is no evidence that rebuts such finding." This description cross-references paragraph IB3(b) which describes the operation of the statutory presumption in 30 U.S.C. § 921(c)(4). The statutory presumption is expressly rebuttable if the proof shows that the miner does not or did not have pneumoconiosis or that his totally disabling impairment or death did not arise out of coal mine employment. Pauley focuses only on the absence in the manual of any reference to section 410.412(a)(1) in paragraph IB6(e). Yet the manual cross-references other parts of the manual and not the regulations. Not only does the reference in paragraph IB6(c) to IB3(b), as well as the plain language of IB6(d), serve the same apparent function as section 410.490(c)'s reference to section 410.412(a)(1), but arguably, the cross-reference immediately preceding IB6(e) to IB9(g)(1), which in turn discusses "disability due to pneumoconiosis," may have an equivalent purpose. The manual provides no clear path to an understanding of SSA's interpretation of its rule.[12]

[12] As noted in the Brief of Respondent BethEnergy Mines Inc. at 19

Neither does it make any sense to assume that SSA irrebuttably presumed disability causation in light of the "virtually impossible" theory.[13] If it were virtually impossible to determine the cause of a miner's disability or death, then shifting the burden of proof to the defense solves the problem for the claimant and allows for rebuttal in those cases when it is not so difficult. It is not difficult to assign the cause of a disability to a non-respiratory health effect and there would seem to be no reason why SSA would prohibit its claims personnel from denying a claim in which benefits were clearly unwarranted (*e.g.*, the miner was disabled by an auto accident).

If SSA intended to write an irrebuttable presumption of disability causation in 1972, applicable only in Part B claims, it could easily have done so. The approach the agency adopted does not imply that it intended to write a rule that was quite so simple. While the rule may be amenable to several interpretations,[14] the complete elimination of the statutory disability causation requirement (*see* 30 U.S.C. § 902(f)(1)) is the most implausible of the options.

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n.18, SSA produced a considerable volume of additional operating guidelines that remain undiscovered.

[13] The theory is an overstatement having no genuine factual foundation. *See* Brief of Respondent BethEnergy Mines Inc. at 8-9, 18.

[14] Dayton's Brief repeatedly insists that DOL keeps changing its mind on the precise location of the disability causation inquiry within the text of section 410.490. In its brief to this Court, DOL does not rely upon the section 410.490(c) cross-references to section 410.412(a)(1), but argues instead that neither DOL nor SSA considered the "total disability" rebuttal methods in section 410.490(c) to be exclusive. DOL also points out that section 410.490(b)(2) (which applies to all medical methods for invocation of the SSA rule), by focusing on "impairment" causation also reflects a focus on disability causation in the SSA rule. The differing focal points of the mine operators' arguments and DOL's are not particularly significant, and both arguments are likely to be correct. The SSA rule is riddled with redundancy, as are the manual provisions. It is not at all unlikely that the same meaning may be drawn from several places in the relevant text.

C. PFT Proof Does Not Conclusively Establish Entitlement to Benefits

Dayton argues that when a claimant invokes the SSA presumption by PFT evidence, both disability causation and the existence of pneumoconiosis are irrebuttably presumed. This ascribes a particularly curious intent to SSA, since the agency knew that its PFT invocation criteria were set at essentially normal levels for retired miners,[15] and thus would predict a zero probability that either irrebuttably presumed fact was true in most cases. SSA was given no authority to promulgate a retirement entitlement for older coal miners.

Dayton's PFT argument is based on the theory that benefits can be denied to a miner with qualifying test scores only if the miner is working or able to work. Adopting Pauley's view of section 410.490(c), it does not matter why the miner is not working. Dayton argues that section 410.490(b)(2) (which inquires into the cause of the impairment detected in section 410.490(b)(1)) does not apply in these cases because it functions only if the miner has pneumoconiosis. Rather, section 410.490(b)(3) alone defines the scope of PFT invocation and the presumption it creates.[16] This theory works only if this Court ignores the cross-references in section 410.490(c), the apparent applicability of section 410.490(b)(2) to all medical invocation methods, and the language in sections 410.416(a) and 410.456(a) (which is incorporated by reference into section

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[15] *See Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 274-75 (1977) (testimony of Dr. Harold I. Passes, Former Acting Chief Medical Officer, Bureau of Hearings and Appeals, SSA).

[16] Dayton ignores the fact that section 410.490(b)(3) may also be read to defeat the presumption in the face of proof that the miner did not have pneumoconiosis or suffer related disability or death. Section 410.490(b)(3) describes a "presumption" but there is no reason to conclude that it describes an "irrebuttable presumption." SSA knew how to write an irrebuttable presumption where it intended to do so. *See* 20 C.F.R. §§ 410.418, 410.458.

410.490(b)(2)), stating that "persuasive evidence to the contrary" matters. It is also necessary to assume for the PFT theory that SSA's presumption was designed to work like DOL's section 727.203 where predicate (invocation) and ultimate (rebuttal) facts are neatly set out to guide the adjudicator, and the burden of persuasion clearly shifts after invocation.

There is no good reason to ignore either section 410.490(b)(2), the cross-references in section 410.490(c), or the plain language of the various cross-referenced rules. The manual is no help for the reasons noted *infra* at p. 9, and in fact does not even contain the equivalent of section 410.490(b)(3). It does, however, contain the equivalent of section 410.490(b)(2) at paragraph IB6(c)(2), which cross-references paragraph IB4 which, in turn, contemplates rebuttal if the "impairment" established by x-ray, biopsy, autopsy or PFT evidence did not arise out of coal mine employment. Both the manual and section 410.490(b)(2) inquire directly into whether the miner has pneumoconiosis, and neither source suggests irrebuttability in connection with this fact element.[17]

Dayton attempts to finally validate the PFT irrebuttability theory by arguing that the SSA presumption should not be read to sanction the sort of "pre-invocation rebuttal" that would follow from the full implementation of sections 410.416 and 410.456 through section 410.490(b)(2). This argument assumes, erroneously, that SSA's presumption is a burden shifting device like DOL's presumption. DOL's rule is clearly designed for application in

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[17] Dayton attempts to blunt the force of section 410.490(b)(2) by stating that prior to 1978, PFT evidence could not be treated as evidence of pneumoconiosis, thus making section 410.490(b)(2) inapplicable in a PFT case. Brief of Respondent Albert C. Dayton at 19, 27 n.17. Although in 1978, the Act was amended to include respiratory impairments arising out of coal mining within the definition of pneumoconiosis, 30 U.S.C. § 902(b), the Senate Committee that proposed this revision noted that this amendment was merely a codification of SSA's existing practices. This was not a substantive change. S. Rep. No. 209, 95th Cong., 1st Sess. 20 (1977).

adversary litigation in which the trier of fact must ultimately find the pivotal facts based upon the complete record. DOL's presumption is enormously beneficial to claimants because, once triggered, the burden of persuasion on all ultimate facts falls to the employer, thus resolving reasonable probabilities in favor of the claimant.

SSA has decided tens of millions of disability and death claims employing a very different and distinctly non-adversarial method in which the SSA adjudicator moves through the elements of the case in series. *See, e.g., Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987) (describing the SSA grid). Most likely, section 410.490 is a crude conglomeration of the grid and the statutory black lung presumptions that allowed SSA's claims personnel to adjudicate black lung cases in a familiar way. The terms "invocation" and "rebuttal" in this setting probably do not have the same meaning that they would have in traditional adversary litigation. More likely, the section 410.490 scheme allowed SSA personnel to look at each element, one at a time, in the overall process of deciding whether or not to make an award.

The SSA adjudicator first established the years of work and then looked at the section 410.490(b)(1) medical evidence. If the requisite years were present and the medical evidence qualified, the claims examiner would go to section 410.490(b)(2) and/or (3) to see if some other information in the file indicated the absence of disease or impairment. The presumption format of paragraphs (b)(2) and (3) probably allowed SSA to skip these steps because, as SSA conceded, it developed no adverse evidence in defense of the agency. There would, therefore, be no "rebuttal" evidence to consider. Turning next to section 410.490(c), the inquiry could be concluded unless SSA knew that the miner was still working or SSA had negative blood gas studies (physical performance tests). *See* section 410.490(c)(2). If there was no such evidence in the file, SSA could then make an award. SSA did not, and would have no reason to, prohibit its claims personnel from investigating each element in the claim in light of all relevant evidence, but

simply set the system up in a way to ensure speedy awards in a non-adversarial setting, partly by making no effort to develop independent evidence and partly by making only a token effort to validate the claimant's evidence. *See* Joint Brief for the Petitioners Clinchfield Coal Company and Consolidation Coal Co. at 12-13.

This Court is clearly correct in observing that "it is plainly not the intended purpose of paragraph [410.490](b)(2) to serve as a rebuttal provision rather than a substantive requirement." *Pittston Coal Group*, 488 U.S. at 120. At the point of section 410.490(b)(2) or (b)(3) inquiry, the substantive element at issue is whether the miner has pneumoconiosis or impairment arising out of mining employment, notwithstanding the affirmative medical evidence allowing the claim to get past section 410.490(b)(1). DOL's "rebuttal" rules merely reflect the placement of the substantive inquiries directed by sections 410.490(b)(2) and (b)(3) into sections 727.203(b)(3) or (b)(4). This approach is better suited to adversary litigation and ensures that the claimant's presumptive bubble does not burst as soon as "persuasive evidence to the contrary" is introduced.[18]

SSA did not need to protect claimants from a loss of the interim presumption when unfavorable evidence crept into a file, because that evidence was never developed.[19] If Congress gave any clear message to DOL in 1978, it was to instruct DOL to "do as SSA says not as they do."

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[18] Section 410.490(b)(2) by referencing sections 410.416 and 410.456 incorporates the statutory presumptions in 30 U.S.C. § 921(c)(1), (2). This Court noted that the effect of these two presumptions "is simply to shift the burden of going forward with evidence from the claimant to the operator." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 27 (1976) (citing Fed. R. Evid. 301).

[19] This fully explains the general absence of "rebuttal" case law in SSA claims, except in the cases of working miners. Rebuttal issues cannot arise unless they are raised by the adversary and supported by proof.

If there was any compromise reflected in the final congressional deliberations over section 402(f)(2), it was to this effect.[20] The agreement reached required DOL to validate awards by ensuring the consideration of all relevant evidence and writing an interim presumption that would clearly promote this objective. H.R. Rep. No. 864, *supra* n.8, at 16; 124 Cong. Rec. 2332 (1978) (statement of Senator Javits); *id.* 3426 (statement of Congressman Perkins). There is no clear indication anywhere that SSA actually wrote largely irrebuttable interim criteria or that DOL was expected to design such a rule for its own claims.

III. DOL'S RULE MERITS DEFERENCE

Apart from section 402(f)(2) of the Act, no legitimate argument can be made that DOL's rebuttal rules violate any provision of the Act. To the contrary, a strong argument can be made that, with one express but non-germane exception,[21] the Act compels inquiry into each factual element of a claim in every case. Dayton and Pauley answer the pervasive statutory focus on the existence of pneumoconiosis, and the establishment of a connection between the disease and total disability or death by arguing (1) that section 402(f)(2) repealed these pre-existing provisions by implication, or (2) by rationalizing the various provisions to the point of inapplicability.

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[20] Dayton, Pauley, and the UMWA argue that section 402(f)(2) reflects a congressional compromise that must be honored by this Court. Purportedly, the compromise mediated industry's wish for new permanent eligibility regulations with the views of those in favor of a largely irrebuttable interim presumption. This theory falters for a lack of proof demonstrating a belief by anyone that SSA's interim presumption was in any way irrebuttable. Congress did compromise the Senate's preference for the development of new DOL criteria for all claims with the House's preference for applying the interim criteria in all claims. This in no way implies the irrebuttability of the SSA's criteria. The House independently proposed but rejected the use of irrebuttable presumptions. *See, e.g.*, H.R. 7, 94th Cong., 1st Sess. § 3(a) (1975).

[21] The Act contains an irrebuttable presumption of entitlement in the case of a miner suffering from "complicated" pneumoconiosis, the most advanced and life threatening stage of the disease. 30 U.S.C. § 921(c)(3).

There is no case to be made here for repeal by implication of, for example, 30 U.S.C. §§ 901(a), 902(f)(1), 921(a), 923(b), or 932(c). *See Traynor v. Turnage*, 108 S. Ct. 1372, 1381 (1988) (holding that repeal by implication will not lie unless such a construction is "absolutely necessary"). The rationalizations are based on the premise that section 410.490 and thus section 402(f)(2) really do compensate total disability or death due to pneumoconiosis, but that factual inquiry into the truth is barred by irrebuttability. The argument is circular and is disproved by the fact that SSA did not write and DOL was not ordered to write an interim rule in which the existence of pneumoconiosis or related disability or death are beyond the scope of factual inquiry. There is, in sum, nothing in the Act to invalidate DOL's rebuttal rules.

If DOL's interpretation of section 402(f)(2) to allow factual rebuttal by the methods set forth in section 727.203(b)(3), (4) is permissible under the Act, these rules may not be struck down. At its very best, section 402(f)(2) of the Act is not a precise mandate. It requires a review of section 410.490 and section 410.490 is certainly amenable to several different interpretations. The best Dayton and Pauley are able to do by their extensive investigations of section 410.490 and SSA's manual is to prove ambiguity. Section 410.490 simply does not use any words to assure the reader that the irrebuttability theory is correct or even likely. The ambiguity alone is enough to sustain DOL's rule. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984). It is all the more appropriate for this Court to sustain DOL's rules because the interpretation advanced by Pauley and Dayton leads to absurd results "plainly at variance with the policy of the legislation as a whole." *See United States v. American Trucking Ass'n, Inc.*, 310 U.S. 534, 543 (1940).

Pauley suggests that this Court should defer to SSA and Dayton suggests that this Court should favor the claimant's interpretation of the Act. Both contend that

DOL's position reflects only the litigating position of its attorneys. These points merit little discussion.

First, it is DOL's rule that is being reviewed and thus it is DOL's interpretation of section 402(f)(2) that matters. SSA had no legal authority to promulgate any rules governing these cases. 30 U.S.C. § 902(f)(1). Even if SSA's prior interpretation of section 410.490 may be considered to have been codified in section 402(f)(2), there is no compelling insight into what SSA meant, or any proof that the two agencies disagreed. A deference exercise focusing on SSA is neither helpful nor appropriate.

Next, courts do not defer to the statutory interpretations of private litigants. There is no basis in the Constitution of the United States or in our jurisprudence for ever according a private party the power to bind Article III courts to the party's own opinions on the meaning of congressional enactments affecting him. The Due Process Clause should, in fact, preclude this result.

Finally, this Court is not faced here with the task of reviewing an agency's litigating position. The subject under review is an agency regulation that was adopted many years before the issues in these cases emerged in litigation. Whatever the agency's lawyers say in court, the fundamental position of the agency has never wavered, and it is due the respect it deserves. *Securities Industries Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 468 U.S. 137, 143-44 (1984). Neither has DOL's rationale ever changed. The agency has maintained consistently that the Act, considerations of fairness, and the Due Process Clause of the Fifth Amendment require the agency to provide mine operators with a fair hearing in black lung claims. The only thing Pauley and Dayton can show is that DOL's lawyers over time have had some difficulty penetrating the verbiage of section 410.490 and its cross-references. The same is true for employers' lawyers and Mrs. Pauley's lawyers who agreed in *Pittston Coal Group* that section 402(f)(2) did not invalidate DOL's rebuttal rules. *See* Joint Brief for the Petitioners Clinchfield Coal Company and

Consolidation Coal Company at 5 n.2. Lawyers for agencies may refine their theories without compromising the otherwise proper views of their executive branch clients. *Bellotti v. Baird*, 428 U.S. 132, 143 & n.10 (1976).

IV. CONGRESS WOULD NOT HAVE ENACTED A BLACK LUNG PROGRAM DOOMED TO PERPETUAL FINANCIAL CRISIS

At various points in their briefs, Pauley and Dayton refer to black lung benefits as "social benefits" or "entitlements" revealing an apparent belief that the courts should find ways to pay everybody in obedience to some hidden statutory purpose. Thus, it is not troubling to them if benefits are awarded to people who do not have black lung disease or who have not been harmed by this disease. This reasoning then ultimately comes to rest on the theory that employers, indeed, cannot be held liable for these clearly non-meritorious cases in keeping with 30 U.S.C. § 932(c). Instead, the claims should be paid by the Black Lung Disability Trust Fund.

The workers' compensation insurance industry stated in its brief amicus curiae that it never insured the claims that would be approved under an irrebuttability theory and that its liability, which is strictly contractual and not statutory, probably would not extend to the coverage of cases like Dayton's and Pauley's. Brief Amicus Curiae of the National Council on Compensation Insurance at 9 n.11. At the same time, Congress has always been acutely aware of the economic reality that the manufacturers excise tax on coal that finances the Trust Fund cannot be increased significantly without doing great harm to the coal industry, energy markets, and the public. *See* 131 Cong. Rec. S15,477-79 (daily ed. Nov. 14,1985) (remarks of Senators Heinz and Warner). When there are no coal tax dollars in the fund to pay claims, the fund borrows from the U.S. Treasury which, in turn, expects repayment with interest. 26 U.S.C. § 9501(c). Congress has, however, found it necessary to place a moratorium on interest accruals because they are likely to be non-recoverable from the coal industry

in any case. *See* Consolidated Omnibus Budget Reconciliation Act of 1985, *supra* n.4. The cost of the benefits sought by Pauley and Dayton will surely fall on the taxpayer. It seems that for Pauley and Dayton SSA's Part B program is simply preferable in all respects to DOL's program and they are essentially seeking its reenactment in this Court.

The adoption of this theory would do great violence to Congress's intent. Noting that substantially all of the costs of the program were being paid by the taxpayer, the Senate Finance Committee in 1977, concluded that this was improper and that these costs should be borne by the coal industry. S. Rep. No. 336, 95th Cong., 1st Sess. 2, 6-8 (1977). The Trust Fund concept emerged from this objective. The Fund's liability was limited to claims in which the miner quit work before January 1, 1970, claims for which there is no responsible operator required to secure the payment of benefits,[22] or where the operator is insolvent or uninsured. H.R. Rep. No. 864, *supra* n.8, at 25; 30 U.S.C. § 934(a)(1). Congress did not at any time expect or intend that differing eligibility criteria would apply depending upon whether the claim was paid by the Fund or an operator. This conclusion would not in any way have been consistent with the benefit financing scheme adopted. *See Director, Office of Workers' Compensation Programs v. Black Diamond Mining Co.*, 598 F.2d 945, 953 (5th Cir. 1979). Nothing in the Act or the legislative history supports the Trust Fund liability theory.

The theory may avoid the constitutional problems raised in these cases and might actually benefit mine operators in the short run and certainly insurers, but it is no more than a contrivance to make it easier to reach a wrong result in these cases. Congress, as much as anything else, intended to enact a financially sound black lung program.

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[22] An operator is required to "secure" the payment of benefits to all potentially eligible employees. 30 U.S.C. § 933. There is "no operator" required to secure payment only if the employer of the miner went out of business before July 1, 1973. 20 C.F.R. § 725.492(a).

It could not have enacted a new open-ended social program for coal miners or a private liability program doomed to failure. This intent should be respected.

CONCLUSION

The decisions of the Fourth Circuit in Nos. 90-113 and 90-114 should be reversed and the decision of the Third Circuit in No. 89-1714 should be affirmed.

Respectfully submitted,

ALLEN R. PRUNTY**
JACKSON & KELLY
1600 Laidley Tower
P.O. Box 553
Charleston, WV 25322

Of Counsel:
JOHN J. BAGNATO
SPENCE, CUSTER, SAYLOR, WOLFE & ROSE
U.S. National Bank Building
P.O. Box 280
Johnstown, PA 15907

MARK E. SOLOMONS*
LAURA METCOFF KLAUS
ARTER & HADDEN
Suite 400
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006

**Counsel of Record for the Clinchfield Coal Company*

***Counsel of Record for the Consolidation Coal Company*